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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, ET AL.,

Appellants,

vs.

R. C. EDWINS, SHERIFF, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT.

May it Please the Court:

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (U. S. Code, Title 28, Section 345), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in

question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54, abolishing writ of error, and providing that all relief which theretofore could be obtained by writ of error, shall hereafter be obtainable by appeal, as amended by Act of April 26, 1928, Chapter 440, 45 Stat. 466.

The statutes of the State of Mississippi, the validity of which is involved, are Sections 6 and 8, Chapter 113, Laws of 1938, known as the Sales Tax Law of Mississippi, and Section 1, Chapter 150, Laws of 1938, which statutes, and the particular Sections thereof mentioned here, are to be found at pages 94, 95, 96 and 97, of the General Laws of Mississippi of 1938, where Sections 6 and 8 are set out, and at pages 348 and 349 of the General Laws of Mississippi of 1938, where Section 1, amending Section 2 of Chapter 119, Laws of 1932, is fully set out, the particular provisions of Sections 6 and 8, Chapter 113, of the Laws of 1938, and Section 1, Chapter 150, of the Laws of 1938, the validity of which is involved being in the following language:

"Sec. 6. Be it enacted, that section 8 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

Taxpayer must keep records—failure to make returns —duty and power of commissioner.

"It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

"The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

"If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty-five per cent for the first offense and

fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Sec. 8 provides: Be it enacted, that section 10 of chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

Sec. 10. If any person having made a return and paid taxes thereon feels aggrieved by the additional assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and shall grant such hearing, notifying the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to cover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain

such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

"Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

"No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 420, code of 1930, shall not apply to taxes imposed by this act. * * *"

Section 1, Chapter 150, Laws of 1938, reads as follows:

"Sec. 1. Be it enacted by the Legislature of the State of Mississippi, that section 2 of Chapter 119, laws of 1932, be amended to read as follows:

"The governor shall designate the other associate commissioner as 'excise commissioner', who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

"It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved in the appeal.

The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol * * *."

B.

Date of Decree and Date of Application for Appeal.

The date of decree sought to be reviewed, June 7, 1943. Suggestion of Error was filed by appellants, and said Suggestion of Error was overruled by the Supreme Court of Mississippi on July 9, 1943. Application of appellants for some member of the Supreme Court of Mississippi to certify that, in his opinion, the decision in the case appealed from is contrary to other decisions of the Court, with authorities, was denied on September 20, 1943. Petition of appellants for allowance of appeal to the Supreme Court of the United States, accompanied by Assignment of Error and Prayer for Reversal, was presented to the Chief Justice of the Supreme Court of Mississippi, in his office in the City

of Jackson, Mississippi, on Tuesday, September 28, 1943, and the appeal was allowed.

C.

Nature of Case and Ruling Below.

This is a proceeding by Bill of Complaint to enjoin appellees from collecting additional Sales Tax from appellants for the years 1937 and 1938, and for a perpetual injunction restraining appellees from executing a judgment of the Circuit Court of Hinds County, Mississippi, 1st District, and the Supreme Court of the State of Mississippi, affirming an additional assessment by appellees, State Tax Commission of Mississippi, A. H. Stone and J. E. Davis, Excise Commissioner, under the supposed authority of Section 6, Chapter 113, Laws of 1938. The Bill of Complaint filed herein alleges, and the demurrer admits that said assessments were made without foundation in fact, and contrary to law; that they were made without evidence, over the objection of appellants, without advising appellants of the nature of case they were called upon to meet, without subpoenaes for witnesses in their behalf, without a Bill of Particulars of the demand of appellees, and after failing to answer the interrogatories propounded to appellees. The Bill of Complaint alleges, and the demurrer admits, that appellees proceeded against appellant contrary to the accepted method of judicial procedure; they failed and refused to grant appellants a hearing, that no adequate hearing was had, that nothing was introduced in evidence to sustain said additional sales tax assessments, and at the conclusion of the pretended hearings held before the State Tax Commission and the Excise Commissioner no report in writing was made, setting forth a review of the cause, and the essential facts of the matter. Appellants raised the question of jurisdiction of appellees to make the two ad-

ditional sales tax assessments without first showing taxpayer had failed to maintain adequate records, and preserve invoices for a period of two years. The Bill of Complaint alleges, and the demurrer admits, that taxpayer moved to quash the assessments else that they should be abated until the statutory duties enjoined on appellees were fully discharged. The Bill of Complaint alleges, and the demurrer admits that appellees refused to investigate the matter fully, and said they would not investigate it fully or at all. No record was made of the testimony of appellant, taxpayer, and the witnesses introduced by him, which the Bill of Complaint shows, and the demurrer admits, said additional assessments were not made from the best information available, as required by the Act, but by comparison, appellees comparing the business of appellant, for the years 1937 and 1938, for which the additional assessments are made, with the business of other merchants in the year 1939, and which testimony further showed that appellees made said additional assessments against appellant, taxpayer, purposely high, to take care of whatever they might be able to find. The Bill of Complaint charges, and the demurrer admits, that such testimony was not contradicted, and not denied; in fact, was not even disputed; no evidence was introduced by appellees, no books, records or other papers and no depositions were taken, and nothing whatever was introduced in evidence. The Bill of Complaint shows, and the demurrer admits, that at the conclusion of the hearing before the Excise Commissioner, pursuant to the provisions of Section 1, Chapter 150, Laws of 1938, said Excise Commissioner failed and refused to submit written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing, setting forth a review of the cause and the essential facts of the matter. There was nothing done that remotely resembles a hearing, and the duty enjoined

on appellees by the statutes to investigate the matter fully, to subpoena witnesses, examine books, records and other data, and at the conclusion of the hearing to submit all written evidence, documents, records, and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause, and the essential facts of the matter, was ignored and violated, and not performed. The Bill of Complaint charges, and the demurrer admits, that appellant, taxpayer, paid all sales tax due the State of Mississippi for the years 1937 and 1938 and that he does not owe additional sales tax for said years, or any years. It is contended by appellants here, that the statutes referred to, as construed and applied by appellees and the Supreme Court of the State of Mississippi, in this cause, deprive appellants of due process of law, and equal protection of the law, and violate the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the State of Mississippi held that the decision of the former case, on certiorari, was the law of this case. As the opinion in the former case shows, the court held it could not consider the lack of evidence to sustain the additional assessments on certiorari, and that whether there was evidence before the State Tax Commission of Mississippi to sustain said additional assessments was not before the Circuit Court of Hinds County, and not before the Supreme Court, because, on certiorari, the court would only consider questions of error or law arising or appearing on the face of the record. Appellants show by their Bill of Complaint, which is admitted by demurrer, that they have not had judicial, as contradistinguished from an administrative, hearing, and they have been deprived of a hearing of their cause on its merits; that the Supreme Court of the State of Mississippi holds that they are powerless to complain of such action, and no court in the State of Mississippi, can investigate the facts charged

in the Bill of Complaint, which are admitted by demurrer. It is contended by appellants here, that the statutes referred to, as construed and applied by appellees, and the Supreme Court of the State of Mississippi, in this cause, deprive appellants of due process of law, and the equal protection of the law, and violate the Fourteenth Amendment to the Constitution of the United States.

The matters involved are substantial in that the statutes, as construed and applied by appellees, in which they were upheld by the Supreme Court of Mississippi, deprive appellant of that due process which the legislature intended, and which it was the intention of the Fourteenth Amendment to guard against impairment by state action. Said statutes were so construed and applied, that appellees were permitted to proceed against appellant without subpoenas for witnesses, without the documents, evidence and depositions provided by the statutes, without being required to inform appellant of the state of case he was required to meet and defend, without a record of the proceedings, and without a finding of fact, setting forth a review of the cause and the essential facts of the matter, contrary to the express provisions of Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, and thus said statutes, as construed and applied, deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The questions involved are, therefore, substantial. Without compliance with the statutes, as enacted by the legislature, appellees in this cause were permitted to make the additional assessments against appellant. Appellant was deprived of the opportunity to know the state of the case against him, given no opportunity to defend himself, and the action of appellees was, hence, arbitrary and capricious. To permit appellees to collect the amount of the said addi-

tional assessments, will take the property of appellant without due process of law.

From the time of filing his petition, following receipt of the registered notice of the additional assessments for sales tax, appellant attacked the constitutionality of Section 6, Chapter 113, Laws of 1938, Section 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of Mississippi, as construed and applied by appellees, in proceeding against him arbitrarily and without due process. The questions involved in this cause are substantial. The Federal question being whether the action of appellees deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statutes themselves, if properly construed and applied, may be constitutional, except as to the delegation of legislative power, later to be covered in this Amended Statement of Jurisdiction, providing for Notice by Registered mail, hearings, introduction of evidence, documents and records and other data, summoning witnesses, making a report in writing setting forth a review of the cause and the essential facts of the matter. Here the procedure was not as provided by the statutes. Appellees so construed the statutes that they were not required to afford appellant an adequate hearing, refused him subpoenas, a record of the cause, refused to investigate the matter fully, or at all, a report in writing setting forth a review of the cause and the essential facts of the matter. They construed the statutes as not requiring them to introduce evidence. Appellant contends he was not afforded a hearing within the meaning of the statutes, that no fair and adequate hearing was held by appellees, and the assessments are void on their face for want of evidence, to support them, and a finding of fact by appellees upon which the court can pass judgment, or know what was before the State Tax Commission of Mississippi, and upon what the

additional assessments against appellant were, and are, founded, beyond the naked charge that appellant owes additional sales tax to the State Tax Commission of Mississippi.

The Federal question presented by the record of this cause was raised by sworn Bill of Complaint, filed herein, R. 4[1], and admitted by demurrer, R. 100.

The Federal question involved in this cause was further presented by Assignment of Errors and Suggestion of Error, R. 115, filed in the Supreme Court of the State of Mississippi.

Appellants append to this Statement of Jurisdiction, Copy of the Opinion of the Supreme Court of Mississippi, reported in 5 So. (2d) 487-489 and in 14 So. (2d) 212-213, as well as copy of Per Curiam request of the Supreme Court of the State of Mississippi for additional briefs on the Federal question involved in this cause.

The Supreme Court of the State of Mississippi affirmed the decree of the Chancery Court of Harrison County, Mississippi, sustaining the demurrer to the Bill of Complaint filed herein and dismissing said Bill at the costs of appellants.

As shown by the record of this cause, by sworn Bill of Complaint, and admitted by demurrer, the two additional sales tax assessments against appellant, taxpayer, have no foundation in fact; they were made without evidence, by conjecture, capriciously, and arbitrarily. As shown by Bill of Complaint, admitted by demurrer, appellant, taxpayer, met the burden imposed on him, demanded a hearing, which is provided by statute, and thereupon appellees failed and refused to grant said hearing and investigate the matter

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[1] All references to the record are to the pages of the certified transcript of the unprinted record prepared by the Clerk of the Supreme Court of Mississippi, and on file with the Clerk of this Court. The record has not yet been printed.

fully before proceeding further. The Supreme Court of the State of Mississippi has sanctioned such procedure, and the statutes involved in this cause, as thus construed and applied against appellants, deprive them of due process of law and the equal protection of the law and violate the Fourteenth Amendment to the Constitution of the United States.

Cases sustaining the jurisdiction of the Supreme Court of the United States to review this cause relied upon by appellants, are the following, in brief:

American Sugar Refining Co. v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102.

Southern P. Co. v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277.

Norfolk, etc. R. Co. v. *Conley*, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745.

Kansas City Southern R. Co. v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 S. Ct. 316.

Merchants' Nat. Bank v. *Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135.

Fiske v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655.

Northern Pac. Ry. Co. v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412.

Southern Ry. Co. v. *Virginia*, 290 U. S. 190.

Londoner v. *Denver*, 210 U. S. 373.

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 171.

Wichita R. & Light Co. v. *Public Utilities Commission of Kansas*, 260 U. S. 48.

Mahler v. *Eby*, 264 U. S. 32.

Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508.

Bi-Metallic Co. v. *Colorado*, 239 U. S. 441.
Ohio Bell Tel. Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292.
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176.
Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.
Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.
Truax v. *Corrigan*, 237 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375.
Mackay v. *Dillon*, 4 How. 431, 11 L. Ed. 1038.
Dower v. *Richards*, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 S. Ct. 452.

It is further the contention of appellant that Section 6, Chapter 113 of the Laws of Mississippi of 1938, is unconstitutional, null and void and violative of the due process clause of the Federal and State Constitutions and the equal protection clause of the Constitution of the United States, in that it permits the Chairman of the State Tax Commission to proceed without benefit of compulsory process for the production of witnesses, books, records and other matter necessary to the proper determination of additional sales tax, and said Act is unconstitutional and violates the Fourteenth Amendment of the Constitution of the United States as to the rights of appellant in that it permits the additional sales tax assessment attempted to be enforced against appellant without the benefit of written evidence, without requiring his interrogatories to be answered and a bill of particulars to be furnished; and, further Section 6, Chapter 113, Laws of 1938, permitting appellees to make additional returns and assessments from the "best information available" without defining and limiting the power and right of the appellees, vests legislative

discretion with appellees, and is an attempt to delegate legislative prerogatives to appellees, and said section, and particularly said provision, is unconstitutional, null and void.

Appellant submits that the questions presented, showing jurisdiction of this Court to review the judgment of the Supreme Court of Mississippi on appeal are substantial, and present a Federal question.

This Honorable Court has jurisdiction to decide and is free to pass upon all controverted issues, whether or not they involve Federal questions, and the permissibility of delegation of power may thus be deliberated and, in the absence of controlling State decisions, will be determined as an original proposition. The case relied upon by appellants to sustain the jurisdiction of this Court upon this last proposition is:

Yick Wo v. *Hopkins*, 118 U. S. 356.

It is respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellants.

APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 35,405

(Opinion Rendered June 7, 1943.)

EDDIE J. VIATOR, et al.,

vs.

R. C. EDWINS, Sheriff, et al.

Division B.

ALEXANDER, *J.:*

Appellant filed his bill for injunction against appellee, who, as sheriff, was proceeding to enforce by execution the judgment affirmed by this Court in Viator *v.* State Tax Commission, 5 So. (2d) 487. The chancellor set a day for a hearing upon application for temporary injunction. The appellee, however, attacked the bill by demurrer which set up that the bill itself which in meticulous detail disclosed all the steps and proceedings precedent to the final judgment in the above case, and further interposed the defense that such case conclusively settled the law of the present proceeding. The chancellor sustained the demurrer and dismissed the bill. It is hardly necessary to add that the demurrer did not admit the allegations of the bill as to the irregularity of the former proceeding and as to the invalidity of the judgment, which are mere conclusions of law.

Appellant's contentions are pressed with painstaking industry and earnestness, and we have examined the entire record carefully. It would not be helpful to rehearse the history of this litigation. Appellant discloses in his bill that he has availed of and exhausted every administrative and legal remedy, and we find it necessary only to quote from the opinion in the former case, which, after discussing the powers of the Chairman of the State Tax Commission and the requirements which must be met to make such

powers effective, stated: 'The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based.'

The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment.

Nor does Code 1930, Section 420, justify this injunctive proceeding. Regardless of conditions precedent to the exercise of this right under this section (as to which see Stone *v.* Kerr, 10 So. (2d) 845), the taxes against the collection of which the injunction was sought are, in view of our former decision, not 'attempted to be collected without authority of law.'

AFFIRMED.

APPENDIX "B".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

(Opinion Rendered January 12, 1942.)

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

14840. In Banc

SMITH, *C. J.:*

This is an appeal from a judgment affirming an order of the State Tax Commission approving two additional sales tax assessments against the appellant. The assessments were made by the Chairman of the State Tax Commission

under the provisions of Sections 5 and 6, Chap. 113, Laws of 1938, and were approved by the State Tax Commission on an appeal to it.

Section 8 of that statute provides that "No injunction shall be awarded by any Court or Judge to restrain the collection of the taxes imposed by this act or to restrain the enforcement of this act." The appellant says that this provision of the statute violates Section 159 of the State's Constitution which prescribes the jurisdiction of the chancery court. This may or may not be true, but we are not called on to determine it for the reason that if this section of the statute does run counter to the Constitution, that fact would have no effect on the remainder of it, which would remain in full force and effect.

Another of the appellant's complaints is that "there is no presumption in favor of the validity of an order unless there is evidence to support such order." The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is "confined to the examination of questions of law arising or appearing on the face of the record and proceedings." Federal Credit Co. *v.* Zepernick Gro. Co., 153 Miss. 489, 120 So. 173; Hamilton *v.* Long, 181 Miss. 627, 180 So. 615.

Three of the appellant's remaining complaints necessary to be considered are:

1. State Tax Commission has only such jurisdiction as conferred by Statute. In the case of additional assessments for sales tax, such can be made only for failure to keep adequate records and preserve invoices for a period of two years. Unless jurisdictional facts appear of record, the State Tax Commission has no jurisdiction to make an additional assessment for sales tax.

2. The claim that taxpayer kept records and preserved invoices for a period of two years, is a denial of an essential jurisdictional fact, and before the State Tax Com-

mission could proceed under the law, jurisdiction to make the additional assessment must be proven by appellees, and must affirmatively appear of record.

3. Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi.

These three complaints will be considered together.

Under Sections 4, 5, and 6, Chap. 113, Laws of 1938, it is the duty of a person liable to the tax imposed on sales of property to make a return to the chairman of the State Tax Commission, on prescribed forms, of all cash and credit sales made by him. When this is done, the chairman of the Commission, designated in the statute, and will hereinafter so be, as the Commissioner, is charged with the duty of examining into its correctness. In so doing, he may examine the books and other records of the taxpayer, if any (Sec. 6), and (Sec. 12) "any books, papers, record, or other data bearing upon the correctness of any return * * * including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in this state, * * * and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons." If (Sec. 6) adequate records of his sales are not kept by the taxpayer, the Commissioner may determine the correctness of the taxpayer's return thereof "from the best information available." If the Commissioner finds that the taxpayer's return of the amount of his sales is less than it should be, it becomes his duty to make an additional return or assessment of the amount of the taxpayer's sales. When this is done, he must give the taxpayer written notice thereof by registered mail, and, if the taxpayer makes no objection thereto, the return or assessment becomes final. If, however, the taxpayer so requests, he shall be given a hearing on the assessment by the Commissioner, and, if dissatisfied with the result thereof, he may appeal (Sec. 8) therefrom to the State Tax Commission which, after a full hearing and consideration of the

evidence introduced by the taxpayer, must either approve, disapprove, or modify the assessment. This procedure was here followed.

Two additional returns or assessments were here made by the Commissioner on blank forms prescribed for that purpose, the statute not requiring such to be entered on an assessment roll. One of these returns, after setting forth the taxpayer's name and address, recites: "An examination of your records made in accordance with Sections 7, 8, and 18 of the Sales Tax Law of 1932 as re-enacted and amended, for the period from January 1, to December 31, 1938 indicates an additional tax due thereon in the amount of $1,606.64, arrived at as follows." It then sets forth the amount of sales theretofore reported by the taxpayer and the amount thereof found by the Commissioner, in addition to that returned by the taxpayer, with this notation, "prima facie assessment, same having been made from the best information available." It then sets forth the amount of taxes due on the sales by the taxpayer. The notice by registered mail to the appellant of this additional return is, in part, as follows: "You are hereby given notice, by registered mail, of the hereinafter assessments made against you from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937, to December 31, 1937 and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years." The other assessment was for the year 1939, and it and the notice were similar to the above. The order of the Tax Commission simply approved the assessments and stated the amount of the tax due thereon.

The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him, is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner,

when the taxpayer's records are inadequate, to determine the correctness of the return made by him "from the best information available."

The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly or by implication, and he can make an additional sales tax assessment in only such cases as the statute permits. He possesses in this respect a special and limited and not a general jurisdiction. A tribunal or officer exercising a special and limited jurisdiction can act only when the facts exist which invest him with authority to act, and these facts, in their ultimate and essential aspects, here the additional assessment and the grounds for making it, must be disclosed by the order made thereon. The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made.

AFFIRMED.

APPENDIX "C".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

In Banc

Per CURIAM:

One of the appellant's contentions is that "Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitu-

tional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi."

The Court desires briefs addressed and confined to the question thus raised. The briefs should discuss the following questions:

1. Is that State Tax Commission a quasi-judicial commission or a mere administrative agency?

2. What "finding of basic facts" should, but does not, appear in the order of the State Tax Commission here in question?

3. What provision of the Constitution, or of a statute, or rule of the common law requires such a finding to appear in the order of the commission?

4. Does the fact that the order here in question is one assessing property differentiate it, in so far as the question here under consideration is concerned, from other orders of an administrative agency?

5. May the recitals in the last notice, the notice being framed by the Commissioner himself, be considered as a part of the order, and as sufficient to supply recitals which, according to appellant's apparent contention, ought to have been a part of the order itself?

No other questions should be discussed in these briefs.

The brief of counsel for the appellant to be filed on or before October 10, 1941; the reply thereto by counsel for the appellee to be filed within one week after the filing of the brief for counsel for the appellant; the rejoinder of counsel for the appellant to be filed within five days after the filing of the brief of counsel for the appellee. These dates may be changed by written agreement of counsel filed with the clerk of this Court; copies to be served in accordance with the rules of this Court.